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83-256

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRISON A. WILLIAMS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error when, in response to a specific question from the jury, it instructed the jury to determine predisposition by focusing on the time when the accused committed the crime.

2. Whether the Government's (a) initiation of an "investigation" without any predicate, (b) continuation of that investigation with active efforts to develop crime for nearly five months before any criminal opportunity was presented to the accused, and (c) offering exorbitant financial inducements while saying that the accused's statements need never be acted upon, was so outrageous as to violate due process of law.

3. Whether extensive warrantless electronic surveillance is consistent with the Fourth Amendment, when it is conducted in the absence of some basis for suspicion of criminal activity.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Harrison A. Williams, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 5, 1983.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 705 F.2d 603, and is reprinted in Appendix A (*infra*, pp. 1a-45a). The opinion of the United States District Court for the Eastern District of New York on due process questions is reported at 529 F. Supp. 1085, and is reprinted in Appendix B (*infra*, pp. 46a-87a).

JURISDICTION

On April 5, 1983, a panel of the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court. The judgment is reprinted in

[1] Parties involved: In addition to the petitioner, Alexander Feinberg was an appellant in the proceedings before the Second Circuit. He has filed a petition: No. 83-5108.

Appendix C (*infra*, pp. 88a-89a). A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on May 24, 1983. The order denying rehearing is reprinted in Appendix D (*infra*, pp. 90a-91a). By an order signed on July 7, 1983, Justice Marshall extended the time for filing the petition to and including August 22, 1983.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

I. Introduction

This is one of a series of cases arising out of the F.B.I.'s Abscam investigation. Although this Court has denied certiorari in the earlier cases,[2] strong factual and legal distinctions justify the grant of certiorari in this case.

With the exception of Senator Williams, each of the other Congressmen was lured into Abscam by a clearly

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[2] Certiorari was denied in *Lederer* v. *United States*, No. 82-1183, *Murphy* v. *United States*, No. 82-1187, *Thompson* v. *United States*, No. 82-1199, *Criden* v. *United States*, No. 82-1240, and *Myers et al.* v. *United States*, No. 82-1255, on May 31, 1983. *See* 103 S. Ct. 2437-38. Certiorari was also denied in *Jannotti* v. *United States*, 457 U.S. 1106.

illegal proposal—the promise of money in exchange for the introduction of immigration legislation on behalf of a rich Arab sheik. Moreover, each of the other Congressmen was identified by a middleman as a person willing to accept a bribe and, in fact, each of them did accept a cash bribe (ranging from $5,000 to $50,000) after one or two meetings with representatives of the sheik.

The Government's attempts to develop a criminal case against Senator Williams, described below in some detail, had a different origin and followed a very different path, making this the only case where the issue of entrapment was fully litigated. These distinctions make this the ideal case for the Court to give further definition to the defenses available to a defendant when the Government has actively participated in the creation of a crime.

II. Facts[3]

In January, 1979, Angelo Errichetti, the Mayor of Camden, New Jersey, met with Senator Williams at the

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[3] A copy of the transcript of the Williams-Feinberg trial, the due process hearing, and the tape transcripts, has been lodged with the Clerk of this Court. Citations to this record will be made as follows:

a. Testimony in the Williams-Feinberg trial—T (*page*). The trial transcript is reproduced in the green volumes (numbered 1 through 5), reprinted for the Senate Select Committee on Ethics.

b. Exhibits in the Williams-Feinberg trial—Ex. (*number or letter*). Tape transcripts are also cited to their page in the green volume (number 6), reprinted for the Senate Select Committee on Ethics—(Sen. Comm. Print, Pt. 6, p. (*page*)).

c. Testimony in the Williams-Feinberg due process hearings —DP (*page*). The due process transcript is reproduced in the blue volume, reprinted for the Senate Select Committee on Ethics.

d. Exhibits in the Williams-Feinberg due process hearings —DP Ex. (*number*).

reopening of a navy shipyard. T 4232-33. Errichetti told the Senator about a wealthy Arab sheik who was looking for investment and financing opportunities in the United States. *Id.* The Senator conveyed the news of this apparently legitimate opportunity for financing to two close friends, Alex Feinberg and Sandy Williams (no relation), who were seeking funding for a titanium mining venture aimed at the production and sale of paint pigment. T 1582, 4234. Those two friends got in touch with Errichetti, who relayed their request for financing back to the Government agents and, at the same time, linked those individuals to Senator Williams. T 616-17.

The Government had absolutely no reason at that time to suspect Senator Williams of any past, present, or future wrongdoing. Even Thomas Puccio, the prosecutor in the case, admitted that there was no reason "to question Williams' integrity before his name came up in this case." DP 413-14. And F.B.I. Agent Goode, who was in charge of the Abscam operation, admitted they were starting with a "clean slate" so far as Senator Williams was concerned. DP 778. Nevertheless, without any attempt to determine whether the Senator was in fact corrupt, the F.B.I. promptly began its affirmative efforts to implicate the Senator in wrongdoing.[4]

Representing themselves to be employees of a wealthy Arab sheik, they scheduled a meeting with the Senator's friends for the very next day (January 11, 1979). At the meeting, Sandy Williams described the mining property, confirmed the viability of the venture, identified potential customers for the various products (a nearby foundry for iron ore and several paint companies for

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[4] There is a very disturbing aspect to this. The record shows that the Government operatives knew that Senator Williams once had an alcohol problem. Ex. 13A, p. 8 (Sen. Comm. Print, Pt. 6, p. 90). Based upon this fact, Mel Weinberg, in a book written about his activities, described Senator Williams as "typical of many former alcoholics, warm wax waiting to be impressed." R. W. Green, THE STING MAN: THE INSIDE STORY OF ABSCAM 159 (1981).

titanium slag), and asked for a loan of $12-13 million. T 1583-85. There was no suggestion at this meeting that government contracts, or any other impropriety, were involved. *See* T 664. As supervising F.B.I. Agent Goode later testified, the mining venture "was on initial appearance, a legitimate operation." DP 894.

Despite the absence of any indicia of criminality, the Government agents expressed serious interest in financing the mining project, and in mid-March used a government plane to fly undercover F.B.I. agents with Sandy Williams and George Katz (an investor in the mine) to view the property. T 620, 1586. Sandy Williams mentioned another plant that was capable of processing the titanium slag from the mine into titanium dioxide, the ingredient actually used as white paint pigment. T 1248-49, 1587. Once again, however, there was no reference during the visit to government contracts or any other form of impropriety. T 681-82.

But the Government was not deterred. They invited Senator Williams to a party given by the "sheik" in Florida on March 23, 1979, purportedly to honor Mayor Errichetti, and at the party suggested to the Senator that he get directly involved in financing the mine. *See* Ex. 2A, pp. 18-20 (Sen. Comm. Print, Pt. 6, pp. 20-22). Shortly after this party, the Government upped the ante by agreeing to provide $100 million in financing for the apparently legitimate business venture.[5] Ex. 4A, pp. 4-5, 8 (Sen. Comm. Print, Pt. 6, pp. 40-41, 44).

With this foundation laid, the Government operatives switched the focus of the venture from titanium dioxide for paint pigment (the only product in which Senator Williams and his associates were interested) to government contracts for titanium metal, which, they suggested,

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[5] Even the Second Circuit admits that "the $100 million loan was initially discussed in connection with what appeared to be an entirely legitimate business transaction". *United States* v. *Williams*, 705 F.2d at 621; App. 38a.

Senator Williams could help to obtain. The first reference to government contracts came on April 23, 1979, after three and a half months of extensive government build-up, when Melvin Weinberg, the Government operative, bluntly asked Sandy Williams:

MW: Alright, now what about uh, let me ask you a question. There's a lot of government contracts that, ya know, on the chemicals.

SW: Right.

MW: Now, can Williams get us the bids on them?

Sandy Williams rejected the notion, making it clear that such a plan of action had not been anticipated or even considered.

SW: Well, I don't know about that. The main thing is with this Cyanamid thing . . . .

MW: Yeah.

SW: They've got customers they've had for twenty, thirty and forty years.

MW: Right.

SW: And if established business and, of course, big big people that buy are paint manufacturers.

MW: Right.

SW: And if we wanna increase our business, we'll have to, we'll have to go into like Sherwin-Williams and people like that and try to get their business away from somebody else.

Ex. WQ, p. 4 (Sen. Comm. Print, Pt. 6, p. 375).

The Government ignored this negative response, and scheduled a May 31, 1979 meeting with the Senator and his friends. Prior to the meeting, a Government agent broached the government contracts idea with Alex Feinberg. Feinberg, like Sandy Williams, made it clear that he had not previously considered government contracts as part of the deal.

TD: Is he going to be able to steer any kind of contracts from the Committee that he's on toward, toward the operation that we're going to get involved with? I mean . . .

AF: Well, this I didn't know until now I have to ask him that.

Ex. 7A-2, p. 1 (Sen. Comm. Print, Pt. 6, p. 54).

Thus, the critical element of criminality supporting Senator Williams' conviction, an agreement on his part to get government contracts for the mining venture, was nothing planned, contemplated, or originated by Williams. It was solely a product of the affirmative action of the Government operatives. Moreover, as the Government conceded in its brief below, it was May 31, 1979, after this Government plan to foment crime had been going on for nearly five months, before the Government made its first "presentation to him [Senator Williams] of a corrupt proposal." Gov't Brief in Ct. of App., p. 76. So even if the Senator did accept the criminal opportunity at the May 31 meeting (and there is a dispute about what actually occurred at that meeting), that acceptance must be viewed as the product of the months of Government activities preceding it.

The Government's efforts to create a crime intensified after the direct criminal proposal was presented. At the suggestion of his supervisors, Mel Weinberg scheduled a direct meeting between Senator Williams and the sheik. Ex. 10A, pp. 4-6 (Sen. Comm. Print, Pt. 6, pp. 73-75). In anticipation of that meeting, Weinberg increased the pressure on the Senator's friends to force the Senator into expressly agreeing to get government contracts, told the Senator's friends exactly what he would be expected to say, and assured the Senator and his friends that the Senator would never have to act upon his promise. The following are typical of Weinberg's comments:

I personally think Feinberg's jerking us off . . . Let Tony and you speak to Senator . . . and all we want to hear from him is that he's going to get us some

> Government contracts . . . . [He later added] I don't think he's got the fucking balls to control Williams . . . . Well, you straighten, you get a hold of Pete and straighten him out."

Ex. WR, p. 4 (Sen. Comm. Print, Pt. 6, p. 396); Ex. WS, pp. 5, 7 (Sen. Comm. Print, Pt. 6, pp. 406, 408).

• • • •

> the Senator's gotta be told alright? In no certain terms that he's gotta move his fucking ass to get the goddamn government contracts.

Ex. 10A, p. 2 (Sen. Comm. Print, Pt. 6, p. 71).

• • • •

> All bullshit . . . . And that's it, it goes no further, it's all talk, all bullshit . . . . You're on stage for twenty minutes.

Ex. 14A, pp. 4, 5, & 7 (Sen. Comm. Print, Pt. 6, pp. 96-97, 99). *See also* Ex. 13A (Sen. Comm. Print, Pt. 6, p. 87).

Finally, Weinberg met personally with Senator Williams and Errichetti immediately before the June 28 meeting with the sheik. In an almost unbelievable and surely inexcusable manner Weinberg told the Senator again and again, and in strong terms, precisely what to say. *See* Ex. 14A (Sen. Comm. Print, Pt. 6, pp. 93-103). Excerpts from this "coaching" session forcefully illustrate the point.

> Forget the mine. Don't even mention the mine . . . . How high you are in the Senate. He's interested in you . . . . Who you know in the Senate can do you favors . . . how important you are. Without, without you there is no deal. You are the deal. You put this together. You worked on this and you can get, you got the government contracts. Without me there is no government contracts. . . . You know the names to mention . . . .
>
> You gotta just play and blow your horn. The louder you blow and mention names, who you control.

Ex. 14A, pp. 2-3, 6 (Sen. Comm. Print, Pt. 6, pp. 94-95, 98). Influenced by Weinberg's insistent pressures and certain that he would never have to act on his words, Senator Williams talked about his connections with influential members of Government. *See* Ex. 15A (Sen. Comm. Print, Pt. 6, pp. 104-130). In addition, although he never expressly guaranteed government contracts, he responded favorably to statements by others concerning his ability to obtain them.

But the Government still was not satisfied. They invented and tried to implicate the Senator in two new criminal scenarios. The first involved an exorbitant financial lure. In September, 1979, the Government created a second group of Arabs interested in buying the mining venture at a $70 million profit. T 1120-21; *see* Ex. 23A, pp. 18, 25 (Sen. Comm. Print, Pt. 6, pp. 225, 232). Of course, the Government operatives asserted that this second group of Arabs also insisted upon the Senator's help to get government contracts. *See* Ex. 23A, pp. 17-18 (Sen. Comm. Print, Pt. 6, pp. 224-25).

In the second scenario, implemented in January of 1980, the Government tried to catch Senator Williams in the money-for-immigration-assistance scam that had worked so well with the other Congressmen. Contrary to the practice in the other cases, however, when the Government set up the "asylum scenario" meeting between the Senator and the sheik they intentionally and inexcusably refrained from mentioning the bribe possibility to Senator Williams and his associates. DP 479-80, 1132. Thus, the Senator had no reason to think that the meeting with the sheik had any illegal purpose. Indeed, his statements at the meeting show that he anticipated a purely legitimate transaction. *See* Ex. 25A, pp. 2-5 (Sen. Comm. Print, Pt. 6, pp. 349-52). Moreover, in striking contrast to the other Congressmen, Senator Williams directly and repeatedly refused the offer of money.

RF: I, I will for, for your help, er, assistance and assistance—I would like to give you, er, you know, some money for, for permanent—

HW: No.

RF: —residence.

HW: No, no, no. This, this is when I work in that area, that kind of activity, it is purely a public not er, no.

Ex. 25A, pp. 8-9 (Sen. Comm. Print, Pt. 6, pp. 355-56).

In sum, then, the Government's unrelenting efforts to cause the clear and unambiguous commission of a crime continued unabated for a full year, at which time further activities were precluded by massive press leaks.

III. Procedural History

On October 30, 1980, Senator Williams was indicted in the Eastern District of New York for violations of 18 U.S.C. §§ 201(c) (bribery), 201(g) (conflict of interest), 203(a) (accepting an illegal gratuity), 371 (conspiracy), and 1952 (Interstate Travel Act). He pleaded not guilty on all counts, and took the stand to explain his statements and actions. At the same time, he claimed that the Government's actions in this investigation constituted entrapment and outrageous conduct, in violation of his due process rights.

The entrapment defense was presented to the jury for decision. The district court judge gave a lengthy and involved instruction on the law of entrapment. T 5572-80.* In brief, he told the jury that the defendants need only show Government inducement, at which point the burden shifts to the Government to show that the defendants were predisposed beyond a reasonable doubt to commit the crimes charged. The judge also discussed in some detail the meaning of predisposition.

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* The full text of the district court's entrapment charge, given twice (T 5572-80, 5700-07), is set forth in Appendix E, *infra*, pp. 92a-96a.

Several hours after beginning deliberations, a confused jury asked the judge to explain the entrapment defense one more time. T 5673. At the judge's request, the jury formulated several specific questions pertaining to entrapment, including a crucial question inquiring about the point in time at which predisposition must be established.[7] T 5698. Following an extended colloquy with counsel, T 5685-95, the judge instructed the jury that predisposition should be determined as of the time when the crime was committed. T 5698-99. The judge then repeated his original lengthy entrapment charge. In this context, the jury returned a verdict of guilty on all counts of the indictment.

The Second Circuit stated unequivocally that the district court's supplemental instruction was erroneous, but decided that the error was not prejudicial. *United States* v. *Williams*, 705 F.2d at 618; App. 31a-32a. The appellate court reached this conclusion by focusing on May 31, 1979, the time when the Government admittedly first presented the criminal opportunity directly to Senator Williams, and by deciding that sufficient evidence existed to permit the jury to conclude that Senator Williams was predisposed at that point in time.

The outrageousness/due process defense was reserved by the judge for post-trial determination. The district court rejected the due process claim presented in this case, without indicating the parameters of the outrageousness/due process defense. *See United States* v. *Williams*, 529 F. Supp. 1085, 1097-1102 (E.D.N.Y. 1981); App. 65a-77a. The Second Circuit, while admitting that "we do not know what sort of circumstances the [Supreme] Court believes would meet this elusive standard," also

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[7] The question asked by the jury was as follows:

> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

rejected the due process challenges. *United States* v. *Williams*, 705 F.2d at 619-20; App. 35a.

REASONS FOR GRANTING THE WRIT

I. THE SUPPLEMENTAL INSTRUCTION ON THE TIME FOR DETERMINING PREDISPOSITION MISSTATED THE LAW IN A FUNDAMENTAL MANNER.

Over the past 50 years, this Court has decided four cases which have established and defined the general scope of the entrapment defense. These are *Sorrells* v. *United States*, 287 U.S. 435, *Sherman* v. *United States*, 356 U.S. 369, *United States* v. *Russell*, 411 U.S. 423, and *Hampton* v. *United States*, 425 U.S. 484. Despite these decisions, however, there is considerable uncertainty in the lower courts about the precise application of the defense. This case gives the Court the opportunity to clarify an important aspect of the law of entrapment, to the benefit of the public, the lower courts, and the bar.

A. The Entrapment Defense Established by This Court Determines Predisposition by Focusing on the Time When the Government Began Its Efforts to Induce the Alleged Offense.

After hearing lengthy instructions and commencing deliberations, the jury asked the district court judge to explain the entrapment defense once again. T 5673. At the judge's request, the jury formulated several more specific questions, including the following significant inquiry:

> Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?

T 5689. Over objections from counsel, the judge responded:

> The inducement question here is a matter of law. It is not a problem you even have to worry about. It is there. The only question that you have to de-

> cide in order to answer the element of entrapment is was the defendant predisposed to commit the crime. You said from day one, or at some other time. *You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he.* (Emphasis supplied.)

T 5699. The judge then repeated verbatim the lengthy entrapment charge previously given. T 5700-07. But the answer to the jury's specific question was firmly implanted in their minds, and they promptly determined that Senator Williams had committed the crimes charged and was at "that time" predisposed to do so.

The jury's question and the district court's precise response raise a fundamental question of federal law not previously decided by this Court. It is important that the Court resolve this issue now, for if the supplemental instruction is allowed to stand, then the entrapment defense firmly established by this Court will, in effect, be vitiated. After all, virtually all defendants are disposed to commit the crime charged at the time they actually do so.

The court of appeals clearly recognized the error in the district court's instruction when it stated that "[a]s a general proposition of law the fragment of the supplemental response now challenged by appellants was erroneous. A defendant's predisposition is not to be assessed 'as of that time when he committed the crime'." *United States* v. *Williams*, 705 F.2d at 618; App. 31a. According to the court of appeals "predisposition refers to the state of mind of a defendant before government agents make any suggestion [directly to a defendant] that he should commit a crime." *Id.* Since the court of appeals found that Senator Wiliams was first directly asked to obtain government contracts on May 31, 1979, five months after the Government's operation had been initiated, they looked only to that date in analyzing and finding predisposition.

The appellate court's interpretation of the law, like the supplemental instruction given by the district court, distorts both the meaning of predisposition and its function in the entrapment defense. Both interpretations of the law of predisposition by the courts below totally ignore the cumulative effects of escalating Government initiative and inducements occurring over a period of nearly five months from January through May of 1979—i.e., the Government's encouragement of the legitimate titanium venture, leading up to its agreement to finance that project, first, to the extent of $13 million, and then of $100 million, the injection of a criminal element into the legitimate business venture, and an entire course of conduct aimed at overcoming the hesitancy expressed by the Senator and his associates over the acceptance of this criminal idea. And the Second Circuit ignored these actions of inducement for the paradoxical reason that they came before instead of simultaneous with or after the direct criminal suggestion.

If either of the lower court interpretations of the law of predisposition is accepted, the universally condemned commercial practice of "bait and switch" becomes an accepted law enforcement technique. The Government can interpose itself into a legitimate transaction, carry it along for months, offer vast inducements to advance it, and then on its own motion, switch to a criminal proposal, relying on the atmosphere it has earlier created to ensure its acceptance, and none of those actions are of any relevance if a predisposition to accept has been developed by the time the crime is proposed. Such a result is inconsistent with the essential goal of the entrapment defense as set forth by this Court, that is, to keep the Government from manufacturing crime. *See Sherman* v. *United States*, 356 U.S. at 372; *Sorrells* v. *United States*, 287 U.S. at 448, 452.

To avoid the creation of crime, a majority of the Court in *Sorrells* v. *United States*, 287 U.S. at 442, held that illegal entrapment exists—

> when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

The controlling question was "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of creative activity of its own officials." *Id.* at 451. That, of course is exactly this case. No one suggests to this day that the offense here was the product of the creative activity of Senator Williams and his friends. The criminal element here was created and introduced by the Government.[8]

Twenty-six years after *Sorrells*, in *Sherman* v. *United States*, 356 U.S. 369, a majority of this Court reaffirmed the commitment to the entrapment defense as it was defined by the Court in *Sorrells*. Neither case specifically discussed the precise time for determining predisposition. The Court's opinions, however, focus on the time when

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[8] Even the district court judge recognized that the criminal suggestion came from the Government, when he said:

> I mean the government was there. They set it up. They requested that he guarantee the taking of the titanium contracts. They are in a sense trying to create the crime. They are setting him up quite obviously.
>
> . . .
>
> I mean it starts with the government, this particular event. Regardless of what other transaction he might have engaged in, this particular event would not have happened but for the government going to the extent it did.
>
> . . .
>
> Quite obviously, the government arranged this thing.

T 4714, 4715, 4717.

the Government agent first approached the defendant and began his efforts to induce commission of a crime. In *Sorrells*, for example, the Court commented upon the defendant's reputation as an industrious, law-abiding citizen before the agent lured him into committing the crime charged. 287 U.S. at 411. And in *Sherman*, the Court's focus on the time before inducement and not the time of the actual criminal suggestion, was evident in its statement that the Government's evidence was "insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian [the informant] approached him." 356 U.S. at 376.

This emphasis on the defendant's state of mind prior to the intrusion of the Government is evident in what this Court referred to in *United States* v. *Russell*, 411 U.S. 423, 427 n.4, as the "standard entrapment instruction." This instruction, taken from Devitt and Blackmar, 1 FEDERAL JURY PRACTICE & INSTRUCTIONS § 13.09, p. 364 (3d ed. 1977), contains the following language:

> If, then, the jury should find beyond a reasonable doubt . . . that, *before anything at all occurred respecting the alleged offense involved in this case*, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents *did no more than offer the opportunity*, then the jury should find that the defendant is not a victim of entrapment. (Emphasis supplied.)

There is nothing in this jury instruction or in the case law which indicates that "anything at all" should be limited, as the Second Circuit suggests, to the ultimate suggestion of a crime. On the contrary, it must be given its plain and natural meaning, which includes any actions taken by the Government to interfere with the defendant's volitional processes and lead him into a criminal act. The district court should have instructed the jury to determine whether the defendant was predisposed to commit the crime charged before "anything at all" occurred respect-

ing the alleged offenses charged in this case. This charge would have directed their attention to "day one" of the long series of actions by the Government agents to lay the ground work for and eventually to induce the criminal act charged.

B. The Improper Supplemental Charge Warrants Reversal.

As the Second Circuit correctly decided, the supplemental instruction now challenged by petitioner is erroneous as a matter of law. *See United States* v. *Williams*, 705 F.2d at 618; App. 31a. Consequently, the verdict which crucially rested on this instruction should have been reversed if the instruction had a "substantial influence" upon the jury's determination. This standard for reversal in a criminal case was established by this Court in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, when it stated:

> If when all is said and done, the conviction is sure that the error did not influence the jury or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Any other approach would subvert the due process requirement that a criminal conviction must be based upon proof beyond a reasonable doubt.

In determining whether a supplemental instruction had the substantial influence required to mandate reversal,

an appellate court must keep in mind the special importance and impact of such a charge. The unique features of a supplemental charge were well summed up by the Second Circuit in the recent decision of *Arroyo* v. *Jones*, 685 F.2d 35, 39 (2d Cir. 1982):

> First, it will have been the most recent or among the most recent, bit of instruction they [the jury] will have heard, and will thus be freshest in their minds. Moreover, it will have been isolated from the other instructions they have heard, thus bringing it into the foreground of their thoughts. Because supplemental instructions are generally brief and are given during a break in the jury's deliberations, they will be received by the jurors with heightened alertness rather than with the normal attentiveness which may well flag from time to time during a lengthy initial charge. And most importantly, the supplemental charge will normally be accorded special emphasis by the jury because it will generally have been given in response to a question from the jury.

Because of the preeminence of the supplemental charge, particularly one related to a vital issue, the error is not cured by a repetition of a prior confusing and unilluminating abstract charge. *Id.*

The influence of the disputed supplemental charge was obvious here. The jury was unable to reach a decision on the predisposition question based solely upon the initial charge. Thus, the judge's direction to focus on the point in time when the crime was committed may well have been the determinative factor leading to the jury's rejection of the entrapment defense. While the jury apparently found Senator Williams predisposed on the day he committed the crime charged (and we do not know from the general verdict whether that day was May 31, 1979, June 28, 1979, or some later date), it is probable that the jury would have found a lack of predisposition to commit the crime charged on some earlier date. For example, if the jury found that the crime was committed

on May 31, 1979, as did the Second Circuit, they may have found Senator Williams nondisposed on March 23, 1979, when he first met with Government agents, and surely would have found him nondisposed on January 11, 1979, when the Government began its efforts to induce crime. Similarly, if the jury found that the crime was committed on June 28, 1979, when Senator Williams met the sheik, the poor quality of the May 31 tape and the audible statements by the Senator on that tape indicating an intent to disclose his interests in the mine, might have led to a finding that he was nondisposed on May 31, 1979, March 23, 1979, or January 11, 1979.

The court of appeals found the erroneous instruction harmless, in essence, because available evidence would have permitted the jury to find that Senator Williams accepted the criminal opportunity when it was first presented on May 31, 1979. *United States* v. *Williams*, 705 F.2d at 609, 619; App. 10a, 33a-34a, 39a. But, as the Court stated in *Kotteakos*, the mere fact that there is enough evidence to support the jury's result if a correct interpretation of the law is applied is not enough to prevent reversal by an appellate court.[9] *Kotteakos* v. *United States*, 328 U.S. at 764. Reversal is unnecessary only when the error did not influence the jury or had only a slight effect. *Id.* Since the erroneous supplemental instruction challenged here undoubtedly had a "substantial influence" on the criminal conviction, reversal with directions as to a correct charge is required.

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[9] The Second Circuit also suggested that the improper supplemental charge did not require reversal because the objection was not properly preserved for review. However, trial counsel indicated his opposition to the supplemental charge before it was given when he stated that "The government has to prove predisposition from day one. In other words, from on or about the first day of January, 1979 these two men were predisposed beyond a reasonable doubt." T 5685-86. In addition, after the charge, counsel asked that all prior objections be incorporated by reference. T 5708. Since the district court had, throughout the trial, relieved counsel

II. THE ACTIONS OF THE GOVERNMENT WERE SO OUTRAGEOUS THAT THEY AMOUNT TO A DENIAL OF DUE PROCESS OF LAW.

A. The Lower Federal Courts Have Been Unable to Define the Government Conduct Prohibited by the Outrageousness/Due Process Defense.

In *United States* v. *Russell*, 411 U.S. 423, the third significant entrapment case presented to this Court, the Court recognized that entrapment was not the only defense available to a defendant when the Government played a significant role in the creation of the crime charged. Although the Court in that case rejected the defendant's claim that he was entrapped as a matter of law because the Government agent had supplied him with a scarce ingredient essential to the manufacture of a controlled substance, *id.* at 427, it noted that:

> We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

Id. at 431-32. The continued viability of this outrageousness/due process defense was confirmed several years later in *Hampton* v. *United States*, 425 U.S. 484. In *Hampton*, a majority of the Court found that the Government role in the creation of crime exceeded the proper limits in the "rare" case where Government overinvolvement in the crime reached "a demonstrable level of outrageousness." *Id.* at 494 & n.7. The Court did not attempt in either case, however, to explain more specifically the parameters of this due process defense.

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of restating objections already made, presentation of the specific objection after the instruction was read was unnecessary.

Moreover, if the instruction was plain error, as the appellate court recognized, then failure to object would not, by itself, stand in the way of reversal. *Kotteakos* v. *United States*, 328 U.S. at 765.

This lack of guidance from this Court has made most lower federal courts reluctant to prohibit any Government conduct, no matter how extreme, so long as it is purportedly aimed at the detection of crime. In fact, of the dozens of cases raising this due process issue, we are aware of only two reported cases, *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), and *United States* v. *Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981), where the due process defense has been sustained. Moreover, in the existing void, the courts have produced a number of vague and inconsistent decisions.

These problems are amply illustrated by the various Abscam-related cases. One district court judge, who presided at the trials of five Congressmen, has consistently found the Government conduct to be within acceptable bounds. *See, e.g., United States* v. *Williams*, 529 F. Supp. 1085 (E.D.N.Y. 1981), App. B; *United States* v. *Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981) (Judge Pratt). Two other district court judges who heard Abscam cases, however, found the conduct of the Government to be outrageous. *See United States* v. *Kelly*, 539 F. Supp 363 (D.D.C. 1982) (Judge Bryant); *United States* v. *Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1981) (Judge Fullam).[10] One of those judges was reversed by an appellate court which acknowledged that a "delineation of the conduct circumscribed by the due process defense is, at best,

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[10] The confusion among district judges is further shown by the charge in the case of *United States* v. *Buckalew*, which is set forth in Devitt and Blackmar, 1 FEDERAL JURY PRACTICE & INSTRUCTIONS 372-73 (3d ed. 1977). The judge there charged the jury that "outrageousness" was a matter to be determined by the jury. He stated: ". . . you must determine whether these acts, as you find them, reach an intolerable degree of over-reaching governmental participation." He further charged that "if the governmental activities reached the point that I have just defined in your minds, then the predisposition of any defendant would not matter." On the basis of this charge, the jury found the defendants not guilty of the offense of breaking into and entering a Selective Service Board office in Camden, New Jersey.

elusive." *United States* v. *Jannotti*, 673 F.2d 578, 606 (3d Cir. 1982). The other judge was reversed by an appellate court which limited the due process guarantee to "coercion, violence, or brutality to the person," [11] but indicated dissatisfaction with such a narrow interpretation and asked this Court to elaborate further on the outrageousness defense. *See United States* v. *Kelly*, 707 F.2d 1460, 1474, 1476 (opinion of Ginsburg, J.) (D.C. Cir. 1983). In the present case, the Second Circuit rejected Senator Williams' due process claims, but at the same time admitted that it did "not know what sort of circumstances the Court believes would meet this elusive standard." *United States* v. *Williams*, 705 F.2d at 619; App. 35a.

The uncertainty thus expressed by three appellate courts concerning the proper limits of the outrageousness/due process defense points out the need for guidance from this Court on this important constitutional issue. Without such guidance, lower courts will continue in their reluctance to condemn any type of Government involvement in the creation of crime, and the limits of what is or is not outrageous Government conduct will in fact be determined by the self-interest and imagination of Government operatives and paid informants. The due process defense established by this Court on two separate occasions requires definition here or it will be rendered meaningless.

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[11] Other courts have not found any similar constraints in this Court's pronouncements. *See, e.g., United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States* v. *Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal. 1981). Physical coercion and duress are already prohibited by other narrowly-defined defenses. Moreover, this Court has recognized in a number of cases that prohibited official compulsion can be mental as well as physical. *See, e.g., Brewer* v. *Williams*, 430 U.S. 387; *Miranda* v. *Arizona*, 384 U.S. 436; *Spano* v. *New York*, 360 U.S. 315. Indeed, sophisticated psychological stratagems (including peer pressure) designed to push an individual into taking a desired course of action are often harder to resist than more obvious forms of coercion, since they are subtle, cumulative, and difficult to detect.

B. The Due Process Limits on Government Conduct in a Bribery Investigation Should Be No Broader Than Those Established by the Department of Justice and the F.B.I. to Ensure the Fairness of the Abscam Operation.

While the essential nature of due process makes it difficult to fashion a rule applicable to all circumstances, it does not preclude the formulation of general guidelines applicable to categories of undercover investigations. We suggest that the outer limits of due process in a bribery case should be no wider than the three safeguards adopted by the Department of Justice to implement the Attorney General's Guidelines on the Use of Informants in Criminal Investigations ("Levi Guidelines") in the context of the Abscam operation. DP Ex. 6 & 110. Those Guidelines were established to ensure that "each undercover operation is carried out in a manner which is fair, unambiguous, productive of successful prosecutions, and which minimizes the impact on or even the involvement with innocent persons." DP Ex. 110, at 138. Moreover, officials heading the agency viewed the safeguards as "essential" to the fair conduct of an investigation. *Id.* at 152. Thus, failure to adhere to those Guidelines is a strong indication that the Government conduct does not meet due process requirements of essential fairness, that it is indeed outrageous, and that it should not be tolerated by any court.[12]

Those safeguards, which were not applied in the present case, are as follows. First, undercover techniques such as those used in Abscam may be used only "when we [the Government] reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur." DP Ex. 110, at 152. Accordingly, when the Government makes the first move it conducts "a care-

[12] As Solicitor General Thatcher said in his brief for the Government (p. 13) in the *Sorrells* case: ". . . the courts are the constituted agencies for the protection of the individual against the misuse of authority."

ful evaluation of anything we are told by intermediaries about the possible interest of other persons in a criminal transaction, and an attempt to check such claims to the extent practicable." *Id.* at 139. Second, where prior assurances of criminality are not possible, the F.B.I. "make[s] clear and unambiguous to all concerned the illegal nature of any opportunity used as a decoy." *Id.* at 139, 170. In other words, the F.B.I. structures the operation so that it is self-selective—i.e., so that anyone who meets with Government agents has selected himself for criminal activity. *Id.* at 153. Finally, under the guidelines, F.B.I. undercover operations are modeled "on the real world" as closely as possible. DP Ex. 110, at 140. "[I]nducements or promises or attractiveness that the real world doesn't offer" are not offered in the context of an undercover operation. *Id.* at 154.

Of course, instances of Government misconduct in addition to the failure to abide by the standards explained above, would provide further confirmation of the outrageousness of the Government conduct in a particular case.

C. The Government's Conduct During Its Investigation of Senator Williams Was Outrageous.

A review of the Government's conduct in the present case reveals that the Government violated each of the three safeguards established by the F.B.I. to ensure a fair investigation. A thorough review also shows a course of Government activity that reeks of impropriety.

First, the Government admittedly had no prior reason to believe that Senator Williams was involved in criminal activity of a given type or pattern. DP 413, 415, 778. Moreover, they did not make any attempt to evaluate either the mining venture or the persons connected with it before scheduling a meeting with the Senator's associates. *See, e.g.*, DP 369-72. In fact, the go-ahead for this investigation was given so quickly—within hours of the time that the Senator's name was mentioned—

that it was not humanly possible for the Government adequately to check out this lead. And there was, in fact, nothing illegitimate about the mining venture and its need for capital.

Nor did the Government, in the absence of prior criminality, make clear the illegal nature of the financing being offered. Errichetti was not told that the sheik was interested only in financing corrupt business ventures, and the Senator's friends were not told, until several months into the "investigation," that active participation by the Senator was sought in connection with the financing. Similarly, Senator Williams was denied the opportunity to select himself for a criminal act since he had no reason to think that the Abdul representatives were engaging only in shady deals. In fact, he selected himself and his friends for an apparently legitimate opportunity to obtain financing for what, as far as he knew (and apart from the Government's deliberate deception), was a legitimate business proposal. *See* DP 894. Since self-selection is effective only if a person knows what he is selecting himself for, the mechanism here failed of its essential purpose. DP Ex. 110, at 153.

Finally, the opportunities presented to the Senator did not mirror the real world. The real world does not offer $100,000,000 loans for business ventures previously unable to obtain even $12-13 million to get them operational. Nor does the real world offer $70 million profits that can be made simultaneously with the receipt of the loan. More importantly, the real world does not grant a person such exorbitant financial rewards simply for making a representation that he is told need never be acted upon.

The entire course of Government conduct here also confirms the impropriety of the Government's actions.[13]

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[13] There are many other facts in this record showing extraordinary Government impropriety. While it is not possible to state them all at length in this petition, two examples are—

1. The Government arranged with the Chase Manhattan Bank that it would tell persons inquiring about the "sheik"

The Government utilized the services of a known and convicted confidence man.[14] It promoted deception through the use of F.B.I. agents who falsely represented that they were agents of a non-existent sheik. These agents utilized a government plane to take Senator Williams' associates to inspect the mine. They introduced Senator Williams to the supposed sheik on a "yacht" in Florida. They proposed financing of $100,000,000 to cover the acquisition of the American Cyanamid processing plant, the titanium mine, and working capital. And all of this was done by the Government over a period of nearly five months before they ever made a "corrupt proposal" to Senator Williams. Indeed, one may fairly wonder: Who was conspiring prior to May 31, 1979? Was it Senator Williams and his friends, or was it the many Government officers and agents who converted a legitimate business inquiry into a criminal scheme and fabricated the government contracts plot?

Nor did the Government stop after the direct suggestion of the criminal proposal. Government agents assured the Senator and his associates that he would never have to engage in any illegal acts. They "coached" him for a meeting with the sheik. They pressured the Senator's friends to act as unwitting Government agents. And they presented increasingly more devious and enticing

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that he was a depositor, with a balance of many millions of dollars. *United States* v. *Jannotti*, 501 F. Supp. 1182, 1193 (E.D. Pa. 1980); *see* T 817.

2. As a part of an effort to produce evidence that Senator Williams would get government contracts, Errichetti forged a letter with Senator Williams' signature on Senate stationery. Ex. WD (Sen. Comm. Print, Pt. 6, pp. 435-41). This was done with the knowledge of Anthony Amoroso, one of the Government agents. *Id.* Although the letter was not used, Senator Williams was not notified, and Errichetti was not prosecuted for this crime.

[14] Judge Sloviter, in *United States* v. *Jannotti*, 673 F.2d 578, 581 (3d Cir. 1982), called him a "career swindler."

criminal schemes in order to trap the Senator in a clearly illegal act. This *is* a case "where the defendants had no prior criminal involvement, and were not about to embark on any criminal activities when the government agents induced them to become involved in" criminal conduct.[15]

The real issue on the merits of this case is not the conduct of Senator Williams. Without the Government's actions, the Senator would never have thought of committing the crimes charged. He would still be the distinguished public servant that he had been for most of his adult life. Thus, it is the Government's year-long effort to destroy his long career of public service that is the proper focus here. And when that effort is analyzed, it is clear that the Government's conduct is outrageous and should not receive the blessing of this Court.

III. UNDER THE CIRCUMSTANCES OF THIS CASE, INCLUDING THE ABSENCE OF A PREDICATE, THE EXTENSIVE ELECTRONIC SURVEILLANCE, WITHOUT A WARRANT, WAS A VIOLATION OF THE FOURTH AMENDMENT.

At the outset of this case, without any reason to suspect particular criminal conduct to appear, the Government subjected Senator Williams and his associates to extensive audio and video surveillance. They justified this conduct on the ground that these recordings were "consensual tapes," that is, that the consent of the Government agent to electronic surveillance of each conversation removed it from the protection otherwise afforded by the Fourth Amendment.

The Government's argument is, of course, derived from this Court's decision in *United States* v. *White*, 401 U.S. 745, which sustained consensual governmental surveillance on the facts of that case. But the *White* decision is a slim reed, at best considered dictum, since a majority

[15] Devitt, J., in *United States* v. *Marcello*, 537 F. Supp. 402, 408 (C.D. Calif. 1982), distinguishing that case from *Batres-Santalino*, *supra*.

of the Court agreed that the result was determined by this Court's decision in *Desist* v. *United States*, 394 U.S. 244, which held that *Katz* v. *United States*, 389 U.S. 347, should not be applied retroactively. Only four members of the Court—Chief Justice Burger, and Justices White, Stewart, and Blackmun—concurred in the decision on the merits. Justice Black concurred in the result on the basis of his dissenting opinion in the *Katz* case, 389 U.S. at 364, which rested on his view that the Fourth Amendment does not apply to electronic surveillance; and Justice Brennan concurred in the result only on the basis of the *Desist* case, making it clear that he agreed with the dissenters but would "go further." *United States* v. *White*, 401 U.S. at 765. Justices Douglas, Harlan and Marshall dissented.

The dissenting opinion of Justice Harlan in *White*, 401 U.S. at 768-95, is particularly trenchant. He pointed out that, when "recent Fourth Amendment decisions . . . are read" with others he discussed, "the primacy of an additional general principle becomes equally evident: official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement." *Id.* at 781. He referred particularly to this Court's decision in *Terry* v. *Ohio*, 392 U.S. 1, where the Court held, in his words, "that any restraint of the person, however brief and however labeled, was subject to a reasonableness examination." *United States* v. *White*, 401 U.S. at 784. He continued:

> The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. . . .
>
> Were third party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacreligious, and defiant discourse—that liberates daily life. . . . All these values are sacrificed by a rule of law that permits official

> monitoring of private discourse limited only by the need to locate a willing assistant.

Id. at 787-89. And he concluded that a warrant rule—

> would not end electronic surveillance. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer.

Id. at 789-90.

In view of the fact that the *White* case is so widely and freely used even though it has never commanded a majority of this Court on the merits, it is appropriate that the Court should now reexamine the issue. Moreover, it is particularly appropriate that the issue should be reviewed in this important case where it is squarely presented on the facts, and where the facts are very different from those involved in *White*.

In *White*, the Government listened in on conversations occurring over a several-week period, forecasting actual deliveries or payments for narcotics. The Government expected on each occasion to obtain evidence of a narcotics violation, and indeed, the surveillance was narrowly circumscribed so as to obtain evidence of those crimes. Moreover, the electronic surveillance in cases relied upon by this Court in *White* (*On Lee* v. *United States*, 343 U.S. 747, and *Lopez* v. *United States*, 373 U.S. 427) was similarly focused on a limited number of discussions of specific crimes.

It is a far cry from those situations to the present case where hundreds of hours of tapes were made in many locations over nearly a year, many of them made before there was any intimation of criminal conduct. Moreover, the recordings were not made to obtain evidence of specific ongoing criminal conduct. On the contrary, the seizures here were wholesale, clearly part of a "fishing expedition" led by a creative con-man for the purpose of recording situations where Senator Williams and his associates might be pressured either into im-

proper conduct or the appearance of improper conduct. This is just the sort of situation where the warrant rule could well serve its constitutional purpose. The question is inherent in the nature of the case, and should receive this Court's review.[16]

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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[16] It is true that this contention was not specifically raised prior to trial in this case, as required by Rule 12 of the Federal Rules of Criminal Procedure. This Court may nevertheless consider the issue "for cause shown." Fed. R. Crim. P. 12(f).

Senator Williams is not making a routine Fourth Amendment suppression argument. On the contrary, he is suggesting that the extensive and long-continued surveillance occurring in the present "investigation," initiated without any prior reason to expect particular criminal conduct to occur, is far too broad and sweeping to be covered by this Court's narrowly divided decision in the *White* case. Moreover, this question was an integral part of the due process argument which was expressly reserved by the trial court for post-trial decision.